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6 **IN THE SUPREME COURT**

7 **STATE OF ARIZONA**

8 PETITION TO REPEAL OR AMEND ) Supreme Court No. R-\_\_\_\_\_  
9 RULE 45 OF THE RULES OF THE )  
10 SUPREME COURT ) REPLY TO COMMENT OF THE  
11 ) STATE BAR

12 The undersigned respectfully submits this Reply to the Comment of the State  
13 Bar of Arizona (the “State Bar”) regarding the Petition to Repeal or Amend Rule 45  
14 of the Rules of Supreme Court. The Reply will address the arguments in the  
15 Comment roughly in the order they are made.

16 First, the State Bar responds to the argument in the Petition that MCLE is a  
17 tool for income generation by noting that MCLE is not only available through the  
18 State Bar. The Petition was not meant to imply that the State Bar is the only entity  
19 that receives income for providing MCLE courses or that the State Bar’s sole  
20 motivation for providing MCLE courses is income generation. MCLE is of course  
21 available from multiple sources, but although free MCLE is available in a few places,  
22 the vast majority of MCLE providers charge for their courses, especially “interactive  
23 courses.”

24 Second, the State Bar rightly notes that the public expects a high degree of  
25 competence from professionals, such as attorneys. The State Bar then argues that  
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1 MCLE is needed to ensure this competence. The State Bar, however, points to no  
2 evidence of reduced bar complaints per attorney, reduced malpractice claims per  
3 attorney, or even polls of increased public satisfaction with the legal profession, since  
4 MCLE has been implemented. Petitioner maintains that MCLE increases attorney  
5 competence by a miniscule amount in light of hours spent practicing. Legal work by  
6 its nature requires the continuous study of new developments.

7 Third, the State Bar mentions in a footnote that a system is already in place for  
8 “thorough and methodical review” of the MCLE rules. But this does nothing to  
9 undermine the utility of the Rule 28 process, under which the present Petition has  
10 been brought. Moreover, under the present Petition, any member of the public may  
11 present comments, whereas the MCLE Review Task Force as described by the State  
12 Bar apparently will consist of some sort of closed committee that will not have the  
13 benefit of public comments, and perhaps not even the benefit of attorney comments.  
14 The present Petition is an appropriate forum for consideration of changes to Rule 45.

15 Fourth, the State Bar notes that many attorneys have the opportunity to attend  
16 MCLE courses through their employers at no cost. But even when a private or public  
17 employer pays for its attorneys’ MCLE courses, it is ultimately the client or taxpayer  
18 who pays for it in the form of legal fees or taxes. Furthermore, the availability of free  
19 courses via one’s employer does nothing to assist those who do not have this  
20 opportunity, and section memberships to the State Bar are only of use to those  
21 attorneys who live in areas where the State Bar provides its CLE courses, i.e.,  
22 Phoenix. Most web-based CLE is not free, and most web-based CLE is also not  
23 interactive, and therefore does not qualify for “interactive” credit. As an example, my  
24 current place of employment is Las Vegas, Nevada. In my short time as a member of  
25 the State Bar, I have received upwards of five pounds of flyers from the State Bar  
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1 advertising MCLE courses, all for approximately \$40 per hour or more, and all or  
2 nearly all available in-person in Phoenix only.

3 Fifth, the State Bar argues that live MCLE presenters have a depth of  
4 knowledge that new attorneys do not have. This is not disputed as a general matter,  
5 but neither is it relevant. The same can be said of legal treatises, legal blogs, and  
6 professional colleagues, all of which are available to new attorneys to answer their  
7 questions. As noted in the Petition, new attorneys (and experienced attorneys) can  
8 easily conduct their own research on the Internet or by speaking to colleagues, and  
9 there is no guarantee that those who teach MCLE courses can answer all questions  
10 asked, in any case.

11 Sixth, the State Bar reproduces seven comments by attorneys who have  
12 commented positively on State Bar MCLE programs. Even assuming that these  
13 unattributed hearsay comments are accurate, the Petition does not dispute that many  
14 attorneys appreciate most courses given by MCLE providers. But certainly just as  
15 many attorneys resent having to attend MCLE courses. Furthermore, seven  
16 comments out of twenty-one years of MCLE is hardly a sufficient sample size, even if  
17 this sampling of comments were randomly selected, which it almost certainly was not.  
18 And even assuming for the sake of argument that 100% of the members of the State  
19 Bar enjoy attending MCLE courses, this does not further the State Bar's argument that  
20 CLE should be mandatory. Any enjoyment attorneys get from attending CLE classes  
21 will surely remain if CLE is made voluntary.

22 Seventh, the State Bar argues that "[i]f lawyers do indeed spend sixty or more  
23 hours per year in legal study, as the Petitioner suggests, the requirement that they  
24 demonstrate their participation in only fifteen hours should not overwhelm anyone."  
25 (Cmt. at 6:3-5). This is a misstatement of the claims made in the Petition, which  
26 nowhere claims that lawyers spend "sixty" hours per year in dedicated legal study.

1 Rather, the Petition suggests that lawyers spend “many hours every year reading  
2 professional journals, books, and Supreme Court opinions.” (Pet. at 3:9–10). The  
3 State Bar has apparently taken the number “sixty” from the preceding passage, which  
4 notes, “[a] typical attorney works 50 to 60 hours per week or more and learns more  
5 about the law and its developments in any typical week than he or she will learn from  
6 watching fifteen hours worth of PowerPoint presentations per year.” (Pet. at 3:6–9). I  
7 stand by this comment. The State Bar has not rebutted it, but rather has  
8 misrepresented it as if it read something like, “lawyers spend sixty hours per year in  
9 private legal study.” The State Bar then concludes that no attorney could reasonably  
10 complain about a requirement to report fifteen of these putative sixty hours of private  
11 legal study. I agree, as far as this statement goes. Taking the State Bar’s apparent  
12 position at face value—that the MCLE requirements cannot be complained of because  
13 reporting existing private study is all that MCLE requires—the State Bar would  
14 presumably not object to an amendment to Rule 45 permitting all fifteen hours of  
15 annual MCLE to be self study (supported by affidavit, of course).<sup>1</sup> Such an  
16 amendment, which the State Bar apparently would not oppose, would be sufficient to  
17 address most of the concerns in the Petition.

18 Eighth, the State Bar argues that many professional organizations require their  
19 members to receive continuing education. This is also irrelevant. First, it may be the  
20 case that those organizations’ requirements are just as unnecessary as the State Bar’s  
21 are. One need only imagine such organizations responding to challenges to their own  
22 continuing education requirements by citing the State Bar’s MCLE requirements to  
23 see the lack of force of this argument. Second, even assuming those organizations’

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24 <sup>1</sup> The regulations in place pursuant to Rule 45 currently permit only five of an  
25 attorney’s required fifteen annual MCLE credits to be through self-study. *See* Reg.  
26 104(B)(5)(c).

1 requirements are helpful or necessary, this says nothing about the value of the State  
2 Bar's MCLE requirements. Nor does it say anything about the value of MCLE  
3 requirements that Maryland and New Jersey recently implemented MCLE. Like the  
4 appeal to the practices of other professions, this is another *ad majoritatum* argument.  
5 The State Bar notes that one unidentified Internet commenter in New Jersey reported  
6 "so much bad lawyering in [sic] past few years . . . ." (Cmt. at 7:22). I currently work  
7 as a law clerk in the United States District Court in a state that has MCLE  
8 requirements similar to Arizona's, and I could probably match any bad-lawyering  
9 story this anonymous New Jerseyite might care to offer. Moreover, the State Bar  
10 includes the following as one of its three selected comments: "NJ has an excellent  
11 system of CLE classes already in place . . . and it is *successful – even though it is*  
12 *voluntary.*" (*Id.* at 8:1–2 (emphasis added)). This comment actually appears to argue  
13 that mandatory CLE was unnecessary in New Jersey. In Arizona, as well, live CLE  
14 courses and self-study alike, both in person and on the Internet, will remain available  
15 for attorneys to take advantage of if Rule 45 is repealed.

16       Finally, I want to again stress the costs of CLE. Fifteen hours of CLE at State  
17 Bar rates will cost an attorney six hundred dollars or more. We all receive monthly  
18 mailings from the State Bar advertising CLE, typically for a cost of at least \$40 per  
19 hour. This effectively triples the annual bar dues for a new member of the bar, and it  
20 effectively doubles the annual bar dues for most members of the bar. Especially with  
21 respect to new members, this is unreasonable. New members of the bar, being only a  
22 few years from law school graduation, are the least in need of CLE, yet the cost of  
23 CLE to these new members is disproportionately high compared to their lower  
24 incomes. And the difference in current income—not to mention employment  
25 prospects—is not the only disparity between junior and senior members of the bar.  
26 New attorneys also retain their law school debt, and in many cases, their

1 undergraduate debt. Furthermore, because the cost of post-secondary education has  
2 so greatly outpaced the rate of inflation over the past ten to twenty years, younger  
3 attorneys bear a greater amount of debt at graduation in proportion to their incomes  
4 than did more senior members of the bar. And many of the more senior members of  
5 the bar had no CLE costs at all upon graduation, because MCLE in Arizona was not  
6 imposed until approximately twenty years ago. If the Court determines that MCLE is  
7 a critical program that must remain in place, then I respectfully request that the Court  
8 impose some form of cost-mitigation system for newer members of the bar, or, more  
9 precisely, for members of the bar with lower incomes and greater law-school-related  
10 debt, regardless of bar seniority. The current system is starkly regressive.

11 In conclusion, the State Bar's Comment consists of arguments that MCLE is  
12 well-intentioned and that continued education is valuable—claims the Petition does  
13 not deny. But the Comment consists mainly of *ad majoritatum* arguments and  
14 statements about the goals of MCLE. The Comment does not claim, much less prove,  
15 that MCLE has achieved its ostensible goals of reducing malpractice and discipline,  
16 increasing client satisfaction, and improving the public's perception of the legal  
17 profession. Finally, the Comment itself acknowledges the value of voluntary and/or  
18 self study, and it fails to adequately address the costs of MCLE. Although I still favor  
19 an outright repeal, in light of the State Bar's Comment, I have no objection to an  
20 amendment to Rule 45 that simply removes the limitation on self-study credits or  
21 limits the price that CLE providers may charge per credit in Arizona.

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23 DATED this 12th day of May, 2010.

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Clerk of the Supreme Court of Arizona  
this \_\_\_\_ day of \_\_\_\_\_, 2010.

by: \_\_\_\_\_

